SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 231.

ODELL JONES, DOCK RUTLEDGE, et al., for and on Behalf of Themselves and Others Similarly Situated,
Petitioners,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondent.

BRIEF

Of Brotherhood of Railroad Trainmen in Opposition to the Conditional Cross Petition of Odell Jones et al. for the Writ of Certiorari to Review a Judgment of the Court of Appeals for the Fifth Circuit Rendered on January 31, 1956.

OPINIONS BELOW.

The opinion of the District Court appears at page 362 of the record of No. 83. The opinion of the Court of Appeals is reported at 229 F. 2d 648.

QUESTION PRESENTED.

Should the Court deny the petition of the Railway in No. 83, the cross petition of the colored trainmen, by their request, will be dismissed.

Only if the petition of the Railway in No. 83 be granted need the cross petition of Odell Jones et al. (No. 231) and this brief opposing it be considered wherein is presented the sole question of whether incidental damages may be awarded for a period beyond one year prior to the commencement of the litigation in the District Court.

THE ARGUMENT.

Counsel for the colored trainmen, in asserting error in the judgments of the courts below limiting incidental damages "to the period subsequent to a date one year prior to the date of the filing of the complaint" misconceive the nature of the litigation and of the duality of the relief it sought and obtained.

Had the complaint alone sought injunctive relief against the Railway and the Brotherhood we would indeed have been concerned with "equitable rights created by federal statutes," and **Holmberg v. Armbrecht,** 327 U. S. 392, cited and relied on by counsel for the cross petitioners, might be applicable.

But this litigation sought incidental damages and as to that aspect of the complaint we do not deal with equitable rights at all. It is ex delicto. It sounds only in tort since it charges and seeks damages for the breach of a duty imposed on both the carrier and the Union by the Railway Labor Act.

In **Brotherhood of Locomotive Firemen, etc. v. Mitchell,** 190 F. 2d 313 (C. A. 5), upon which, along with **Steele,**[1] **Tunstall,**[2] **Graham**[3] and **Howard,**[4] the decision of the court below is rested, it is said:

> "The Brotherhood alone has appealed.
>
> "Here, attack upon the findings and the judgment takes two forms. The first is the earnest insistence that the action is barred by the Alabama Statute of Limitation of One Year. Citing many Alabama cases and the Oklahoma case of Foster v. Walker, 203 Okl. 3,

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[1] *Steele v. Louisville & N. R. Co.*, 323 U. S. 192.

[2] *Tunstall v. Brotherhood*, 323 U. S. 192.

[3] *Graham v. Brotherhood*, 328 U. S. 232.

[4] *Brotherhood v. Howard*, 343 U. S. 768.

217 P. 2d 533, on the limitation issue, appellant insists that since the suit is not one for an accounting or upon express trust, but one in tort for violation of its obligation as statutory agent of appellees, the suit, though injunctive relief is requested, is in reality a suit at law to which the one year statute applies." * * *

"Appellees' brief, on the issue of limitation, ignores the claim of the suit and the provisions of the decree for damages. It treats the matter before us as involving only the question of appellees' right to equitable relief by injunction. In opposition to the claim that limitation has barred the action, it urges that the obligation of the defendant Brotherhood, as plaintiffs' statutory agent to represent their interests, was continuous; that limitation, therefore, cannot, and has not, run against its claim for injunctive relief compelling the Brotherhood to discharge its statutory obligation to plaintiffs by correcting any injustices it has caused and by avoiding them in future." * * *

"We have given careful consideration to these respective contentions and the authorities cited in the light thrown upon them by the opinion in the Steele case with its full discussion of the true basis and nature of the action.

"We agree with appellees that the obligation imposed by statute upon defendant to fairly represent the plaintiff and to actively negotiate and contract in their interest, is a continuing one, and that, insofar as the suit undertakes, by a claim for injunctive relief in respect of it, to hold the defendants to the performance of that obligation, limitation does not run against it.

"This is bound to be so, because as the right and duty to negotiate is always open, so the right to compel new negotiations to remedy injustice created by, or not dealt within, prior negotiations, is always open.

> "We agree with appellant, however, that insofar as the suit seeks damages arising out of actions done in violation of that obligation in the past, plaintiffs are cut off by the Alabama Statute of Limitations from claiming damages sustained more than one year prior to the filing of the suit." * * *

Suppose this litigation, seeking no injunctive relief, had been by Odell Jones alone to recover damages of the carrier and the Union for wages asserted to have been lost by him through their concerted conspirational violation of the statute.

The applicable period of repose would have been one year based upon Alabama Code, Title 7, Section 26, absent any contrary provision in the Railway Labor Act itself.

As repects the incidental damages and ordered to be ascertained and allowed we are dealing neither with rights arising from a constructive trust nor from an implied contract for as it has been said, "The law will not imply a contract to do a thing merely because a statute imposes a duty to do that thing." 12 Am. Jur., p. 504.

If the limitation on the right to recover incidental damages is not one year, what is it?

While urging that the one year statute cannot apply because we are here concerned with Federal rights created by Federal statutes, counsel does not bother to suggest any other period but leaves that problem wholly in the air.

Surely unlike the injunctive relief, which according to **Mitchell**, brooks of no such containment, there is somewhere some period beyond which these incidental damages may not be sought. The failure of counsel to propose any such period demonstrates the fallacy of their arguments.

In this connection we cite **Cope v. Anderson**, 331 U. S. 461. That litigation was concerned with equitable proceedings brought in the District Courts of Ohio and Penn-

sylvania under 12 U. S. C. A., Sections 63 and 64, to recover assessments on shares of an insolvent national bank.

We point out that the suits were in equity. We point out too that the rights to be vindicated were bottomed upon a Federal statute. Nevertheless, in that case Mr. Justice Black writing for the Court declared:

> "There is no federal statute of limitations fixing the period within which suits must be brought to enforce the statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. McDonald v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 S. Ct. 297; McClaine v. Rankin, 197 U. S. 154, 158, 49 L. ed. 702, 704, 25 S. Ct. 410, 3 Ann. Cas. 500; Rawlings v. Ray, 312 U. S. 96, 97, 85 L. ed. 605, 607, 61 S. Ct. 473. Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted. **And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.** (Citing cases.)"

The **Cope** decision is a complete answer to the contentions of the cross petitioners.

The conditional cross petition for the writ of certiorari to the court below should be denied (No. 231) irrespective of the action of the Court in No. 83.

Respectfully submitted,

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Certificate of Service.

I, J. K. Jackson, one of the Attorneys for the Brotherhood of Railroad Trainmen, hereby certify that I have served a copy of the above and foregoing brief and argument on William H. Sadler, Jr., and Jerome A. Cooper, Esqs., Attorneys for the other parties to this litigation on this ..... day of September, 1956.

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J. K. JACKSON.